

POLITICS, PSYCHOLOGY, AND THE LAW: WHY MODERN PSYCHOLOGY DICTATES AN OVERHAUL OF FEDERAL RULE OF EVIDENCE 609

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I. PSYCHOLOGICAL ASSUMPTIONS UNDERLYING FEDERAL RULE OF EVIDENCE 609

The ultimate purpose of the Federal Rules of Evidence is to implement a particular set of rules to further the truth-finding function that is at the foundation of any trial.¹ No provision of the Federal Rules of Evidence has been subject to more controversy than Rule 609, which deals with the admissibility of criminal convictions used to impeach witnesses.² Likewise, no provision of the Federal Rules of Evidence has been the subject of more debate within Congress.³ The text of Rule 609 reflects Congress's belief that the truth-finding function of a trial is furthered when, subject to the requirements of Rule 609, witnesses' criminal convictions are admitted before the fact finder. After significant debate and many proposals, revisions, and amendments, the relevant text of Rule 609 reads as follows:

- (a) For the purpose of attacking the character for truthfulness of a witness,
 - (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
 - (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that

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¹ See FED. R. EVID. 102: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." See also Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001).

² Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295 (1994). Additionally, Rule 609 applies to both criminal and civil trials. The focus of this article is on the effect of Rule 609 in criminal trials. Whether there are varying policy arguments to treat the application of Rule 609 differently in criminal and civil trials is beyond the focus of this article.

³ "Discussion of Rule 609(a) consumes a total of nine pages of the Congressional Record...As a point of comparison, discussion of Article 8 in its entirety, encompassing highly controversial changes to traditional hearsay doctrine, was limited to five pages." *Id.* at 2303, n.45.

establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.⁴

Several justifications have been advanced for admitting a witness's conviction. Admitting a witness's convictions may allow the trier of fact to more accurately assess the credibility of a witness who appears to the jury to have led a blameless life, when in fact the opposite is true. In this regard, the jury will not be misled by the witness.⁵ Additionally, it has been suggested by some commentators that since a criminal conviction can only be obtained after satisfying the highest possible burden of proof — proof beyond a reasonable doubt — there is little concern that the jury will be presented with evidence of a witness's criminal convictions when in fact the witness had not committed the crime.⁶

However, the most commonly advanced argument justifying the admission of criminal convictions to impeach a testifying witness rests on the belief that a criminal conviction reflects a certain type of character trait. In an oft-quoted passage, McCormick defines "character" as a "generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."⁷ In this regard, "[t]he traditional argument for admitting convictions to impeach is that the evidence is probative of witness credibility, since one who has committed a crime is more likely to lie than is a person with a spotless record."⁸ The argument follows that if a witness has committed a crime of untruthfulness in the past, the witness

⁴ FED. R. EVID. 403(b): Time limit — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

⁵ See, e.g., *United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979).

⁶ See, e.g., *United States v. Werbrouck*, 589 F.2d 273, 277 (7th Cir. 1978); see also Mason Ladd, *Credibility Tests- Current Trends*, 89 U. PA. L. REV. 166, 176 (1940).

⁷ C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 340-41 (1st ed. 1954), quoted in FED. R. EVID. 406 advisory committee note.

⁸ Gold, *supra* note 2, at 2298 (citing J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 519 (1979)).

possesses the specific character trait of untruthfulness and therefore might lie when testifying.⁹ “Convictions for other serious crimes supposedly reveal a more general trait; the witness is not law abiding. The existence of this trait suggests the witness may be as willing to lie under oath as the witness was willing to engage in the criminal behavior that led to the convictions.”¹⁰

What is clear is that in accepting that impeachment by conviction of a crime aids the fact finder in making a determination concerning the credibility of a witness, the drafters of Rule 609 made certain assumptions concerning human psychology.¹¹ The most important assumption the drafters made is that past behavior may be an accurate predictor of current or future behavior.¹² It appears that this assumption was based on what the drafters perceived as a common sense view of how people behave.¹³ This view of human behavior was accepted by the drafters without giving much thought as to whether the study of psychology, an area of study whose sole focus is on human behavior, would support the main assumption upon which the rule is premised.¹⁴ The legislative history of Rule 609 illustrates that both proponents and opponents of the Rule accepted the psychological assumption upon which Rule 609 is based as so seemingly obvious as to be beyond debate.¹⁵ Indeed, the legislative history of Rule 609 reveals very little in the way of actually testing the validity of that psychological assumption.¹⁶ The witnesses who testified before Congress concerning Rule 609 paid little, if any, attention to arguments concerning modern psychological studies that may support the validity of the drafters’ assumption.¹⁷

⁹ *Id.* at 2310-11. See, e.g., *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989) (noting, “It seems plausible (no stronger statement is possible) that a person who has used deceit to commit a crime is more likely than either another type of criminal or law-abiding person to perceive the witness stand as an attractive site for further deceit . . .”); *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987) (stating, “That crookedness and lying are correlated is the premise of Rule 609 (a), and is not for us to question.”)

¹⁰ Gold, *supra* note 2, at 2311.

¹¹ See *Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates*, 46 F.R.D. 161 (1969); see also Gold, *supra* note 2, at 2310-11 (citing Mason Ladd, *Credibility Tests-Current Trends*, 89 U. PA. L. REV. 166, 178 (1940); Robert G. Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1, 15 (1968)).

¹² Gold, *supra* note 2, at 2311.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 29 (1973) at 223, 235 (statement of John J. Cleary, Executive Director, Federal Defenders of San Diego, Inc.); *Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary (Supp.)*, 93d Cong., 1st Sess. 25 (1973) (letter from Charles R. Halpern and George T. Frampton, Jr., Center for Law and Social Policy (Apr. 13, 1973)); *Id.* at 76-77 (letter from Alvin K. Hellerstein, Association of the Bar of the City of New York (May 10, 1973)); *Id.* at 82 (letter from Jean F. Dwyer, U.S. Magistrate (May 11, 1973)); *Id.* at 116 (letter from Robert W. Meserve, President, American Bar Association (June 20, 1973)); *Id.* at 268-70 (memorandum of Professor Richard H. Field); *Id.* at 273-74 (letter from Harry S. Gaucher, Jr., Connecticut Bar Association (July 31, 1973)); *Id.* at 337, 340 (letter from Kenneth J. Burns, Jr., American Bar Association (Sept. 12, 1973)).

¹⁶ See generally *Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 29 (1973); *Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary (Supp.)*, 93d Cong., 1st Sess. 25 (1973).

¹⁷ *Id.*

Instead, the legislative history of Rule 609 reflects what is not a debate about the validity of the psychological assumptions underlying the rule, but instead a debate that pitted political ideologies against each other.¹⁸ On one side of the debate, members of Congress argued that preventing the types of convictions admissible under Rule 609 from going before the fact finder amounted to advancing the interests of criminals before the interests of society in seeing criminals convicted and punished.¹⁹ On the other side of the debate, members of Congress advanced the interests of the accused in receiving a fair trial by arguing that the admission of criminal convictions before the jury was so prejudicial as to prevent such from happening.²⁰ Left unresolved by the debate in

¹⁸ Gold, *supra* note 2, at 2305 (citing 120 Cong. Rec. 37,075-76 (Nov. 22, 1974)).

¹⁹ *Id.* at 2305, n.57.

Mr. McCLELLAN... We have gone pretty far already in trying to protect criminals and granting every advantage to them against society. No one can deny that we provide every legal and legitimate right to make certain that a defendant charged with crime has a fair trial. And that aspect of the law should be defended and maintained. But why should one who has already been convicted of rape or murder and is later being tried for armed robbery, not be able to be questioned about his previous crimes, so that a jury might properly evaluate the credibility of the testimony he is giving - properly determine if he should be believed?

The jury must weigh all the testimony it has received and determine: "We believe this witness," or, "we don't believe that witness." If this bill is enacted as here proposed, that jury would be denied the right or the opportunity to weigh the testimony of the defendant in light of the fact that the defendant is a convicted felon.

Can it really be argued that the fact that a person has committed a serious crime - a felony - has no bearing on whether he would be willing to lie to a jury?

... Mr. President, there is no justification in my judgment that could possibly warrant our making the precipitous change proposed in this bill - a change that can only weaken our efforts at law enforcement. It cannot result in perfecting society. It cannot result in promoting the general welfare. It will serve only, Mr. President, to give further advantage to and to enhance the opportunity for convicted criminals to escape justice, by not permitting a jury to know of their criminal conduct and convictions in the past. I hope this amendment will be adopted...

... Surely a person who has committed a serious crime - a felony - will just as readily lie under oath as someone who has committed a misdemeanor involving lying. Would a convicted rapist, cold-blooded murderer or armed robber really hesitate to lie under oath any more than a person who has previously lied? Would a convicted murderer or robber be more truthful than such a person?

Of course not!

The fact that a person has committed such a serious offense in the past clearly bears on whether he would lie under oath where his life or liberty was in jeopardy.

Id. at 37,076-77.

... Mr. McCLELLAN... Are we going to once again say to society, "You have no protection any more"? Why do we keep going so far? The further we go in loosening up the laws, the more and more crime increases. Will we never learn? Everything today is being done to find some way to protect the criminal, while society is forgotten.

Id. at 37,080-81.

²⁰ *Id.*

Mr. HART... We can tell each other that the purpose of the trial is to discover the truth, and the court is an institution intended to require of the State that it establish the guilt of the accused; but if in truth an accused and his counsel, in order to take the stand in an effort to present their defense, to respond to the State, know in advance that upon the accused's taking the stand the jury will be told that he was a bank robber, that is not the charge here, this is another bank, or that he was a rapist, that it was not this one, but it was another, does anyone really seriously think that a careful instruction to that jury will serve to remove from the minds of

Congress is whether the psychological assumption underlying Rule 609 is actually an accurate assumption concerning human behavior.

II. THE PSYCHOLOGICAL ASSUMPTIONS UNDERLYING RULE 609 ARE INVALID

Noticeably absent from the psychological assumptions upon which Rule 609 is based is any acknowledgment of the role that different circumstances may play in determining how a person may act. The rule assumes that a person who has committed the type of crime admissible under Rule 609 is the type of person who will lie in court, which is a very broad conclusion drawn from a very specific act. In drawing this conclusion, the drafters of Rule 609 assumed that a person's character remains constant and unaffected by the environment in which he or she is acting. In the case of Rule 609, this assumption is being made with respect to character for truthfulness or law abidingness.

Psychologists agree that some continuity in personality does exist.²¹ Indeed, people do display some consistent personality traits regardless of the situation they are in, and a person's behavior is not solely determined by context.²² However, when interpreting other people's behavior, humans very often overestimate the importance of fundamental character traits and underestimate the importance of situation and context.²³ Psychologists refer to this phenomenon

the jurors the existence of that prior conviction? I do not think one has to have spent a lifetime in criminal litigation to know that we are kidding ourselves if we think that the instruction removes the poison.

Id. at 37,078.

Mr. KENNEDY... While I supported the version passed by the House, I believe the position adopted by the committee represents a fair and reasonable balance between the needs of society and the right of the accused to an impartial jury verdict based on the evidence of guilt or innocence of the crime charged and not based on prejudicial events that occurred in the past.

Mr. President, all authorities agree that the greatest source of prejudice to a defendant is a prior felony conviction. Thus, many innocent defendants will not take the stand to testify in their own defense, if a prior felony conviction can be used against them. Jurors may conclude that the defendant is guilty because he has not taken the stand. On the other hand, if the defendant does testify, the jury may base its verdict on his prior conviction, rather than solely on the evidence before it...

Id. at 37,080-81.

Mr. HARTKE. Is it not true that if the reconsideration were successful, the trial of that individual would not be upon the question of his guilt or innocence, but that we would be trying a man upon his prior conduct?

Mr. HART. I think so.

Mr. HARTKE. That is the whole essence of what the star chamber was all about. That is what the Revolutionary War was all about. We can change the whole country and go back to the dictatorial scheme of things and try people on our moral code and burn them at the stake...

Id. at 37,082.

²¹ Walter Mischel, *Continuity and Change in Personality*, 24 AMERICAN PSYCHOLOGIST 1012, 1012 (1969).

²² *Id.*

²³ LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 88 (1991); see also Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1388 (2003) (discussing psychologists' views that the existence of the Fundamental Attribution Error is firmly established).

as the Fundamental Attribution Error (FAE).²⁴ Psychologist Walter Mischel argues that the reason our minds work like this is that the human mind needs a kind of “reducing valve.”²⁵ The purpose of this “reducing valve” is summarized by Malcolm Gladwell in his book, *The Tipping Point*: “If we constantly had to qualify every assessment of those around us, how would we make sense of the world? How much harder would it be to make the thousands of decisions we are required to make about whether we like someone or love someone or trust someone or want to give someone advice?”²⁶ To demonstrate how the FAE works in everyday life, Gladwell provides the following example:

If I asked you to describe the personality of your best friends, you could do so easily, and you wouldn’t say things like “My friend Howard is incredibly generous, but only when I ask him for things, not when his family asks him for things,” or “My friend Alice is wonderfully honest when it comes to her personal life, but at work she can be very slippery.” You would say, instead, that your friend Howard is generous and your friend Alice is honest. All of us, when it comes to personality, naturally think in terms of absolutes: that a person is a certain way or is not a certain way.²⁷

However, the field of psychology is rich with examples demonstrating “that when we think only in terms of inherent traits and forget the role of situations, we’re deceiving ourselves about the real causes of human behavior.”²⁸

Perhaps the most well known study demonstrating the importance of situational context on the behavior of any particular actor is Philip Zimbardo’s Stanford Prison Experiment. In the summer of 1971, Professor Zimbardo set up a mock prison on the Stanford University campus.²⁹ He randomly selected twenty-three volunteers and divided them into two groups.³⁰ The participants were described as normal and healthy young men.³¹ They were randomly assigned the role of prisoner or guard, and told to act the way a prisoner or a guard would act in a typical prison environment.³² By the second day of the experiment, the prisoners were in full rebellion.³³ In an attempt to handle the prisoners, the guards moved to psychological punishment, and even

²⁴ See Dripps, *supra* note 23, at 1388; see also J.G. Miller, *Culture and the Development of Everyday Social Explanation*, 46 J. OF PERSONALITY AND SOC. PSYCHOL., 961-78 (1984) (arguing that research shows that cultural differences may in large part determine whether one is susceptible to the FAE; people from individualist societies are far more likely to look at the world through the prism of the FAE than people from more collectivist societies).

²⁵ Mischel, *supra* note 21, at 1012.

²⁶ MALCOLM GLADWELL, *THE TIPPING POINT* 162 (2000).

²⁷ *Id.* at 158.

²⁸ *Id.*

²⁹ *Hearings Before the Subcomm. No. 3 on Prisons, Prison Reform, and Prisoner’s Rights: California on the Judiciary*, 92d Cong., 1st Sess. 15, 111-13 (1971).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

some physical violence.³⁴ As the experiment progressed, the guards became even more sadistic.³⁵ They denied the prisoners food, water, and sleep; shot them with fire extinguishers; threw their blankets into the dirt; stripped them naked; dragged the prisoners across the yard; and even forced them to simulate acts of sodomy.³⁶

The actions of the guards and the inmates grew so out of control that Zimbardo had to terminate the experiment after six days even though he had originally planned for it to last two weeks.³⁷ The ultimate question posed by the Stanford Prison Experiment is why would people who, prior to being assigned the roles of guards and prisoners were described as having the personality traits one would expect to find in normal and healthy individuals, behave as they did? The answer lies in the context in which they were acting. Professor Zimbardo described the major implication of his experiment as follows:

One, I think, is individual behavior is largely under the control of social forces and environmental contingencies, things that occur, rather than some vague notions of personality traits, character, will power, or other empirically unvalidated constructs. Thus, we create an illusion of freedom by attributing more internal control to ourselves, to the individual, than actually exists. We thus underestimate how powerful are the forces in the social environment that we are in because we overestimate, we put too much stock in, some notions of character, free will or personality traits for which there is no evidence, psychologically, that they exist. In large measure, we are and do what is determined by situations that we are in.³⁸

Professor Zimbardo's conclusion that people behave largely based upon the situational influences exerted upon the actor at a particular point in time is further supported by the work of psychologist Judith Harris in her book, *The Nurture Assumption*.³⁹ In *The Nurture Assumption*, Harris examined the effect that birth order has in explaining personality. In particular, Harris explored the traditional notion that older siblings are domineering and conservative, and younger siblings are more creative and rebellious.⁴⁰ What Harris discovered is that while birth order does affect how people behave, this influence is greatly reduced when people are not around their families.⁴¹ For example, the study showed that older siblings, when not with their families, are generally no more likely to be domineering and conservative than their younger siblings, and their younger counterparts are no more likely to be more creative and rebellious than their older siblings.⁴² As Harris stated, "Evidence exists that environmental differences within the family,

³⁴ *Hearings Before the Subcomm No. 3 on Prisons, Prison Reform, and Prisoner's Rights: California on the Judiciary*, 92d Cong., 1st Sess. 15, 111-13 (1971).

³⁵ *Id.*

³⁶ *Id.* See also Claudia Dreifus, *Finding Hope in Knowing the Universal Capacity for Evil*, N.Y. TIMES, Apr. 3, 2007, at F2 (describing the extent of the abuse that occurred during the experiment).

³⁷ *Hearings Before the Subcomm No. 3 on Prisons, Prison Reform, and Prisoner's Rights: California on the Judiciary*, 92d Cong., 1st Sess. 15, 111 (1971).

³⁸ *Id.* at 113-14.

³⁹ JUDITH HARRIS, *THE NURTURE ASSUMPTION* (1998).

⁴⁰ *Id.* at 365.

⁴¹ *Id.* at 374-75.

⁴² *Id.*

such as those associated with birth order, leave no long-term marks on children's personalities. Even in childhood, firstborns do not behave differently from laterborns when they are outside the home, playing with their agetates."⁴³ Harris's finding in *The Nurture Assumption* once again demonstrates the importance of context and environment in determining how a person will behave.

Perhaps one of the most intriguing demonstrations concerning the influence of environmental factors on a person's actions can be seen in an experiment inspired by the biblical story of the Good Samaritan, conducted by Princeton University psychologists John M. Darley and Daniel Batson in 1973.⁴⁴ The biblical story of the Good Samaritan from the New Testament, Gospel of Luke, tells the tale of a traveler who had been beaten, robbed, and left for dead on the side of the road from Jerusalem to Jericho.⁴⁵ Two pious men, a priest and Levite, pass by the wounded traveler without lending a helping hand.⁴⁶ The only man to help was a Samaritan, a member of an outcast minority who treated the wounds of the traveler and brought him to a local inn for aid and shelter.⁴⁷ Darley and Batson attempted to replicate the story of the Good Samaritan at the Princeton Theological Seminary.⁴⁸ The psychologists gathered students in individual sessions and asked each one to walk over to another building on campus to give a short speech, either about their motives for studying theology or about the biblical parable of the Good Samaritan.⁴⁹ Some students were told that they should leave immediately as they were already late, and other students were told they had ample time.⁵⁰ An actor was planted along the way, slumped in an alley, head down, eyes closed, and groaning.⁵¹ Darley and Batson discovered that, "Contrary to expectations, the content of the speech made no difference to behavior. People asked to give either speech, including the one on the bible's parable of the Good Samaritan, were no more likely to help. What mattered a great deal, by contrast, was whether students were in a hurry. Of those that were told that they were in a hurry, only 10 percent stopped to help; of those told that they were early, 60 percent stopped to help."⁵²

After interviews with the students, Darley and Batson concluded that while some students realized the person was in pain and in need of assistance and consciously chose to disregard that person's pain, other students indicated that because they were in a hurry the extent to which the person was suffering was not clear to them.⁵³ In other words, it was not that all those who chose not to assist made decisions reflective of being the kind of person who would choose not to help someone in need of aid. Instead, "whether a person helps or not is an instant decision likely to be

⁴³ The British Psychological Society Research Digest Blog, <http://bps-research-digest.blogspot.com/2007/09/switching-parents-around.html>.

⁴⁴ John M. Darley & Daniel Batson, "From Jerusalem to Jericho": A Study of the Situational and Dispositional Variables In Helping Behavior, 27 J. OF PERSONALITY AND SOC. PSYCHOL. 1, 100-08 (1973).

⁴⁵ Luke 10:30-37 (King James).

⁴⁶ *Id.* at 10:30-32.

⁴⁷ *Id.* at 10:33-37.

⁴⁸ Darley & Batson, *supra* note 44, at 102.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Peter Steinfelds, *Beliefs; Running in the Fast Lane But Behind Schedule, Who Among Us Has Time for Good Deeds?*, N.Y. TIMES, Apr. 1, 2000, at A10.

⁵³ Darley & Batson, *supra* note 44, at 107.

situationally controlled. How a person helps involves a more complex and considered number of decisions, including the time and scope to permit personality characteristics to shape them.”⁵⁴

While the above studies clearly illustrate the importance of environmental factors in human decision making, the landmark series of experiments conducted in the 1920s by New York-based researchers Hugh Hartshorne and Mark May are perhaps the most salient with respect to the psychological assumption upon which Rule 609 is based.⁵⁵ Over the course of several months, Hartshorne and May took 11,000 students between the ages of eight and sixteen and had them take several different types of tests.⁵⁶ These tests were all designed to measure the honesty of those taking the tests.⁵⁷ The tests given to the students included simple aptitude tests, math and reading tests, and tests of physical endurance.⁵⁸ These tests were conducted in many different environments.⁵⁹ Some tests were given at home, some in school, some with the teacher present, and some without the teacher present.⁶⁰ The researchers set up the tests in such a way as to make it possible for the students to cheat, and for the researchers to gauge how much cheating was going on.⁶¹

From these tests the researchers were able to fill close to three volumes of results.⁶² The researchers learned that a lot of cheating was taking place, and that there was some level of consistency as to who was cheating.⁶³ For example, they found that the girls cheated as much as the boys.⁶⁴ The smarter students cheated a little bit more than less intelligent students.⁶⁵ Children from unstable homes cheated less than children from more stable homes, and older children cheated more than younger children.⁶⁶ However, the researchers’ principal conclusion was that the single most important factor determining whether a student cheated or not was the environment in which the student took the test.⁶⁷ The research revealed that some students cheated on certain kinds of tests, but not on others, or that some students cheated when the test was administered in certain settings but not in other settings.⁶⁸ For example, a student who cheated on a reading test at home might not cheat on a math test in school, and vice versa.⁶⁹ Hartshorne and May concluded “that something like honesty isn’t a fundamental trait, or what

⁵⁴ *Id.* at 108.

⁵⁵ GLADWELL, *supra* note 26, at 155.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 155-56.

⁵⁹ *Id.* at 156.

⁶⁰ *Id.*

⁶¹ Hugh Hartshorne & Mark May, *Studies in the Organization of Character*, in READINGS IN CHILD DEVELOPMENT 190-97 (H. Hunsinger ed., 1971).

⁶² GLADWELL, *supra* note 26, at 156-57 (citing HUGH HARTSHORNE & MARK MAY, STUDIES IN THE NATURE OF CHARACTER, VOL. 1, STUDIES IN DECEIT (1928)).

⁶³ *Id.* at 157.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ GLADWELL, *supra* note 26, at 158.

⁶⁸ *Id.* at 157.

⁶⁹ *Id.*

they called a ‘unified’ trait. A trait like honesty, they concluded, is considerably influenced by the situation.”⁷⁰ They went on to state,

Most children will deceive in certain situations and not in others. Lying, cheating, and stealing as measured by the test situations used in these studies are only very loosely related. Even cheating in the classroom is rather highly specific, for a child may cheat on an arithmetic test and not on a spelling test, etc. Whether a child will practice deceit in any given situation depends in part on his intelligence, age, home background, and the like and in part on the nature of the situation itself and his particular relation to it.⁷¹

While the Hartshorne and May studies were conducted in the 1920s and involved school children, their findings were remarkably similar to those revealed in a large observational study of social behavior conducted by psychologist Walter Mischel in 1995.⁷² For six years Mischel conducted an extensive observational study of children ages seven to thirteen in a residential summer camp.⁷³ The study focused on the children “in vivo,” meaning in real everyday life situations over an extended period of time.⁷⁴ Each participant was observed during the course of the six week summer for an average of 167 hours.⁷⁵ Each child was observed in five different interpersonal situations, which included situations Mischel characterized as “peer teased, provoked, adult warned child, peer initiated positive social contact, and adult praised child verbally.”⁷⁶ What Mischel found was that each child’s behavior was not determined by general and consistent personality traits, but instead by situational factors.⁷⁷ In rejecting the notion that an individual’s behavior is determined by a set of consistent and fixed personality traits, Mischel concluded, “The initial assumptions of trait-state theory were logical, inherently plausible, and also consistent with common sense and intuitive impressions of personality. Their real limitation turned out to be empirical. They simply have not been supported adequately. Instead, the research shows that behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior.”⁷⁸ Instead, Mischel concluded that, not only were each person’s actions in large part determined by situational factors, but also that people tended to respond consistently to the same types of situations.⁷⁹ Mischel believed that this level of consistency across the same types of situations occurred because each person is defined by

⁷⁰ *Id.* at 157-58 (quoting HARTSHORNE & MAY, *supra* note 62).

⁷¹ *Id.*

⁷² W. Mischel & Y. Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REVIEW 2, 246-68 (1995).

⁷³ *Id.* at 248-49.

⁷⁴ *Id.*

⁷⁵ *Id.* at 249.

⁷⁶ *Id.*

⁷⁷ *Id.* at 250.

⁷⁸ Miguel A. Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1052 (1984) (citing W. MISCHEL, PERSONALITY AND ASSESSMENT 6 (1968)).

⁷⁹ *Id.*

what he called “personality signatures.”⁸⁰ Based on these findings Mischel created an “if then theory” of personality.⁸¹ Put simply, “if A *then* she X, but if B the *she* Y.”⁸² To provide a clear example condensed from years of archived data, Mischel describes the following example: “Child 9 was more verbally aggressive than others . . . when warned by an adult, but showed less aggression than others on average when approached positively by a peer. . . . In contrast, Child 28 was most verbally aggressive when approached positively by a peer, but not particularly aggressive when warned by an adult.”⁸³ Although the Hartshorne and May studies, as well as those performed by Mischel involved school-aged children and not adults in a courtroom setting, these studies, along with the additional studies referenced above, nevertheless raise serious doubts concerning the validity of looking at human behavior from the perspective of a theory of unified and consistent character traits.⁸⁴ Indeed, as Mischel points out, “The construct of personality rests on the assumption that individuals are characterized by distinctive qualities that are relatively invariant across situations and over time. In a century of personality research, however, abundant evidence has documented that individual differences in social behaviors tend to be surprisingly variable across different situations.”⁸⁵

As previously stated, Rule 609 is based in part upon the assumption that a person who has committed an act of untruthfulness in the past is an untruthful person and may be lying on the witness stand.⁸⁶ Furthermore, the reason certain types of convictions that are unrelated to untruthfulness are admissible under Rule 609 is the belief that these convictions reflect the general character trait of not being law abiding. It is assumed that one who has engaged in this type of criminal behavior in the past is the same type of witness who is willing to commit perjury on the witness stand.⁸⁷ This is true regardless of whether the crime with which the witness is being impeached has anything to do with perjury.⁸⁸ However, as illustrated above, people are not defined exclusively by consistent general character traits such as truthfulness or law abidingness. Indeed, the above studies undermine the underlying psychological assumption upon which Rule 609 is premised by demonstrating that whether one is truthful or law abiding is in large part dependent not upon the type of person we may believe one generally is, but instead on the environment and context in which that person is acting. Because Rule 609 overestimates the importance of general character traits, and underestimates the importance of the situation and context, the psychological assumptions upon which Rule 609 is based reflect at its very core the Fundamental Attribution Error.

⁸⁰ Mischel & Shoda, *supra* note 72, at 260.

⁸¹ *Id.* at 248.

⁸² *Id.* at 246.

⁸³ *Id.* at 249.

⁸⁴ Mendez, *supra* note 78, at 1052-53 n.269 (citing H. HARTSHORNE & M. MAY, STUDIES IN THE NATURE OF CHARACTER STUDIES IN DECEIT 411 (1928)).

⁸⁵ Mischel & Shoda, *supra* note 72, at 246.

⁸⁶ See *supra* notes 7–10 and accompanying text.

⁸⁷ *Id.*

⁸⁸ Examples of crimes a witness could be impeached with that have nothing to do with perjury include Title 18 Section 1859 which carries with a three year penalty for interrupting a land survey conducted on Federal Property, Title 18 Section 1154 which carries with it a maximum five year penalty for dispensing certain prohibited intoxicants in Indian Country, and Title 18 Section 1463 which carries with it five year penalty for mailing indecent mater on wrappers or envelopes.

The fact that someone is untruthful or willing to break the law in one context does not prove that he or she will be untruthful or break the law in another context. The above studies demonstrate that the reason a person may engage in a certain type of behavior is heavily influenced by one's environment. When a person's environment changes, the environmental factors that led him or her to commit a particular crime also change. "Take homicide in the way of dueling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear -- and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it -- has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie -- and the inference of the law is, that he cannot open his mouth but lies will issue from it."⁸⁹ The above example, offered by Jeremy Bentham long before the modern psychological studies referenced above, illustrates that drawing broad conclusions about a witness's character without regard for the context in which the witness finds himself or herself is of little probative value in assessing how the witness will behave on the witness stand because the environmental factors present in court are not the same factors present at the time and place when the witness committed a crime.

The same can be said even with more restrictive use of evidence of crimes of dishonesty⁹⁰ because the context in which one crime of dishonesty occurs is not the same context in which a person is testifying in court. Rule 609 allows the fact finder to assess the character of a witness in the most general and consistent terms, while disregarding the differing contexts in which the witness may have found himself or herself when committing the crime and when testifying in court.

"From this psychological perspective, evidence that a witness has been convicted of a felony involving dishonesty or has cheated on his taxes may or may not tell us anything about whether he was truthful on the stand."⁹¹ Because the psychological assumption upon which Rule 609 is based has been shown to lack validity, this raises the ultimate question of why Rule 609 still has a role in the modern American criminal trial.

III. RULE 609 OF THE FEDERAL RULES OF EVIDENCE SHOULD ONLY ALLOW FOR IMPEACHMENT BY CONVICTION OF A CRIME WHEN THE WITNESS HAS BEEN CONVICTED OF PERJURY

The only conviction that should be admissible under Rule 609 is a conviction for the crime of perjury. As explained below, perjury is the only type of criminal conviction that modern psychology indicates has any probative value in aiding the fact finder in making a credibility determination. The legislative history of Rule 609 reveals Congress's belief that criminal

⁸⁹ J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 519, 728 (1979).

⁹⁰ There are many types of crimes of dishonesty. Some of these are fairly obvious such as theft, forgery, or perjury. However, there is much debate amongst legal scholars and no shortage of case law attempting to define what is a crime of dishonesty. McCormick in an oft quoted passage maintained that a crime of dishonesty "involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." C. MCCORMICK, EVIDENCE § 42 at 145 (4th ed. 1992).

⁹¹ Mendez, *supra* note 78, at 1052.

convictions for crimes other than perjury aid the fact finder in determining credibility.⁹² Nonetheless, the extraordinary amount of debate within Congress concerning Rule 609 demonstrates that Congress was aware that the admission of a criminal conviction under Rule 609 would dramatically impact the trial because the jury may convict the defendant for improper reasons.⁹³ The jury may convict based on dislike for the defendant due to the nature of a prior conviction. As stated by one member of Congress, “There is serious doubt in my mind, and I speak from considerable professional experience, that it is possible for a man to receive a fair trial if the jury knows he has committed, for example, the crime of child molesting. I think it is almost impossible for that man to receive a fair trial under those circumstances. It is so bad in my estimation, Mr. Chairman, that the admission of evidence of unrelated crimes when the defendant himself is on the stand, borders upon a denial of due process.”⁹⁴ Further, in some cases the fact-finding process may be stalled because a defendant may be unwilling to testify due to a prior criminal conviction. To that end, one member of Congress stated during the legislative debate on Rule 609, “My experience is that admitting conviction evidence to impeach is utterly unfair. We put the fellow, whoever had any record, in this box. Either he can refuse to take the stand, as he is entitled to under the Fifth Amendment, and let the case go, or else he takes the stand and they crucify him with these previous irrelevant crimes which have nothing to do with what he is now on trial for.”⁹⁵

It is also possible that the prior conviction may function as propensity evidence; the jury may believe that because the defendant committed a crime at one point, he has committed the current crime. In this regard, “The dangers are that the jury may convict a ‘bad person’ who deserves to be punished, not because he or she is guilty of the crime charged but because of other misdeeds, and that the jury will infer that because the accused committed other crimes, he or she probably committed the crime charged.”⁹⁶ This type of evidence is prohibited under Federal Rule of Evidence 404 (b).⁹⁷ Congress was aware of these potential dangers, but also wanted to create a rule of evidence that conformed with the traditional goals of the criminal justice system. The ultimate construction of Rule 609, in allowing for the admission of criminal convictions, “reveals the risks of inaccurate fact-finding that Congress was willing to assume in order to balance these interests.”⁹⁸

Congress was willing to take these risks because of the belief that the admission of prior convictions, while posing a threat to fairness of the trial, aids the fact finder in deciding if a witness was credible. However, for the reasons explained in Part II of this article, the basis upon which the rule rests is simply untrue. Prior convictions for crimes committed in one context are

⁹² See *supra* Part I.

⁹³ Gold, *supra* note 2, at 2313-15.

⁹⁴ *Id.* at 2303 n.46 (quoting comments of Rep. Dennis).

⁹⁵ *Id.* at 2303 n.46 (quoting comments of Rep. Wiggins).

⁹⁶ EDWARD OHLBAUM, OHLBAUM ON THE PENNSYLVANIA RULE OF EVIDENCE 160 (Matthew Bender & Co. 2006-2007).

⁹⁷ FED. R. EVID. 404 (b): “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.”

⁹⁸ Gold, *supra* note 2, at 2310.

of little or no probative value when assessing the credibility of a witness who is testifying in court in an entirely different context. As a result, the admission of the criminal conviction accomplishes two things. First, it may cause the jury to convict an otherwise truthful and innocent defendant because of the defendant's prior criminal record.⁹⁹ Second, it may prevent an otherwise truthful and innocent defendant from aiding the fact finding process because the defendant will refuse to testify knowing that he or she will be impeached pursuant to Rule 609.¹⁰⁰ Further, the rule may cause a jury to disbelieve a witness other than the defendant who is testifying truthfully, or once again retard the fact finding process by preventing an otherwise truthful witness from being called to testify. As a result, Rule 609 ensures all of the risks associated with the admission of prior criminal convictions, without realizing any of the assumed benefits the Rule is supposed to provide in assessing the credibility of a witness.

Recognizing that Rule 609 can dramatically impact the result of a criminal trial, yet does not further its underlying goal of aiding the fact finder in assessing the credibility of a witness, there are several possible courses of action which could be employed to address the unfairness of Rule 609. If one accepts the argument that the psychological assumptions upon which Rule 609 is based are false, questions of a constitutional dimension may exist. Rule 609 may impact the outcome of a criminal trial either by placing a conviction in front a jury which may be misused when those convictions have little probative value to the fact finder, or by preventing a defendant from testifying. These consequences raise issues with respect to substantive due process, and the Fifth Amendment right to testify. Those issues, while certainly worth mentioning, are beyond the scope of this particular article.

It may be argued that the drafters of Rule 609 addressed the potential prejudice associated with the admission of criminal convictions by creating two balancing tests which leave to the discretion of the trial judge the option to exclude prior convictions if he deems the admissions of those convictions unfair.¹⁰¹ The two balancing tests in Rule 609 are as follows. First, when a witness other than the defendant is being impeached with a criminal conviction punishable by death or imprisonment in excess of one year, that conviction is deemed presumptively more probative than prejudicial. The burden is on the party seeking the exclusion of the conviction to show the opposite.¹⁰² This is the standard balancing test employed by Rule 403 of the Federal Rules of Evidence.¹⁰³ Second, if the witness being impeached with a conviction of death or imprisonment in excess of one year is the accused the conviction is the deemed presumptively more prejudicial than probative, and the burden is on the party seeking admission to prove otherwise.¹⁰⁴

However, any kind of balancing test which may allow for the exclusion of convictions misses the point. Because the psychological assumption upon which the rule is based is false, the rule does very little to aid the fact finder in assessing the credibility of a witness. Instead, Rule 609 may seriously prejudice that witness. Therefore, a revision of Rule 609 that allows for criminal convictions under any circumstances, with the exception of perjury, is fundamentally unfair. The

⁹⁹ *Id.* at 2313-14.

¹⁰⁰ *Id.* at 2314-15.

¹⁰¹ See FED. R. EVID. 609(a).

¹⁰² *Id.*

¹⁰³ FED. R. EVID. 403: "Although relevant, evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¹⁰⁴ See FED. R. EVID. 609(a).

balancing tests contained in Rule 609 in no way address the faulty psychological assumption upon which the rule is based.

Additionally, it may be suggested that the current text of Rule 609 remain the same, with a new instruction created to enlighten the jury on the importance of context and environment in evaluating the witnesses' testimony. Even assuming that a jury would follow such an instruction, reforming the current jury instruction completely fails to address the fact that the psychological assumptions from which the rule derives its validity are false. Acknowledgement of a need for such an instruction admits the problem with Rule 609 in the first place.

Because the aforementioned balancing tests are insufficient, Rule 609 should be substantially revised. The only conviction which should be admissible under Rule 609 is a conviction for perjury. While arguments similar to those made above can also be made against allowing in a perjury conviction, there exists a stronger basis in psychological studies for the assumption that a perjury conviction predicts a future tendency to lie on the stand. Clearly, the circumstances are not exactly the same every time a witness testifies. Certainly, the facts of the particular testimony may be different, the witness' posture in the criminal justice system may be different, and a witness' motive for testifying may be different. For these reasons, it cannot be said that if a witness has lied on the stand in the past, that witness is lying on this occasion. However, modern psychological studies show that while a witness may act differently in different contexts, similarity in contexts also influences a person's actions. Evidence of this effect can be found by looking at the studies conducted by Hartshorne and May referenced in Part II. While Hartshorne and May concluded that altering the environment in which a test was given affected whether a student cheated or not, they also found that when the environment was the same, even if months had passed, the same students cheated in the same ways.¹⁰⁵ "If you gave the same group of kids the same test, under the same circumstances six months apart, Hartshorne and May found, the same kids would cheat in the same ways in both cases. But once you changed any of those variables – the material on the test, or the situation in which it was administered, the kinds of cheating would change as well."

The studies of Walter Mischel also support such a position. Once again, what Mischel determined was not just that people's behavior is determined by the situation they find themselves in, but also that people tended to behave consistently when they found themselves in the same situations. What Mischel characterized as his "if then" theory tells us is that if a person lies in one context (e.g., the court room), then when the context is the same, he will repeat the same conduct. As a result, modern psychological studies support the notion that because the conviction for perjury occurred in the same context in which the witness would be testifying, the similarity in the circumstances would seem strong enough that it may serve to aid the jury in deciding whether to believe the witness.

IV. CONCLUSION

Rule 609 is premised on two particular psychological assumptions concerning human nature. The first assumption is that one who has committed a crime of untruthfulness is an untruthful person and therefore may be the kind of person who would lie on the witness stand. Second, the type of person who engages in criminal wrongdoing punishable in excess of one year

¹⁰⁵ GLADWELL, *supra* note 26, at 157.

in prison or death is not a law abiding person and is therefore the kind of person who would take the witness stand and commit another crime by perjuring himself.

Rule 609 embraces a view of human behavior that asks the jury to draw broad conclusions concerning the character of a witness as either untruthful or not law abiding. The drafters of Rule 609 did not consider the role that environmental or situational factors may play in determining how a person acts. By assuming the people act in a way consistent with general character traits and paying little attention to the role of environment, the drafters of Rule 609 embraced the Fundamental Attribution Error, which provides that when people interpret the behavior of others, they tend to overestimate fundamental character traits and underestimate the importance of context.

Modern psychological studies have shown that while people do have consistent character traits, perhaps the most important factor in explaining why a particular person acts a particular way is the environment in which they are acting. In this regard, the underlying psychological assumptions upon which Rule 609 is based are false. Just because a person was untruthful or not law abiding in one environment does not mean that he will behave the same way when the environment is different. Because the convictions admissible under Rule 609 occurred in an environment different than the environment in which the witness is testifying, with the exception of perjury, those convictions are of little or no probative value. Therefore, the only convictions which should be admissible under Rule 609 are convictions for the crime of perjury.